

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

800 RIVER ROAD OPERATING
COMPANY, LLC d/b/a CARE ONE AT
NEW MILFORD

Case 22-CA-204545

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

A. Overview

This case involves findings by Administrative Law Judge Benjamin W. Green (the judge) that Respondent 800 River Road Operating Company, LLC d/b/a Care One at New Milford¹ (Respondent or the Center), a rehabilitation and nursing facility, violated Section 8(a)(5) of the National Labor Relations Act (the Act) in two ways: (1) by taking disciplinary action without first providing Charging Party 1199 SEIU, United Healthcare Workers East (the Union) notice and an opportunity to bargain in violation of Section 8(a)(5), as controlled by the Board's decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016); and (2) by unilaterally decreasing the hours of 20 bargaining unit employees without providing the Union notice and an opportunity to bargain.

The instant case deals with actions allegedly taken by the Center during the period that it was challenging the Union's certification from March 9, 2012, when the Union won a secret ballot election, to January 24, 2017, when the Court of Appeals for the D.C. Circuit rejected the Center's challenges to the election and ordered the Center to bargain with the Union. The Union filed a charge on August 16, 2017, and an amended charge on February 1, 2018. The charge alleged the Center committed several unfair labor practices during the period of the challenge: unilateral changes to health and 401(k) benefits, maintenance of unlawful handbook policies, unilateral decrease to certain employees' wages, unilateral increase to certain employees' wages, failure to bargain after issuing discipline, failure to bargain before issuing serious discipline in violation of *Total Security*, and unilateral reduction of employee hours.

¹ Care One at New Milford was previously named Woodcrest Health Care Center, and references to Woodcrest and Care One at New Milford both refer to the Center. (Tr. 22).

The General Counsel issued a Complaint and Notice of Hearing on March 30, 2018, on only the wage increase, unlawful handbook policies, discipline, and reduction of hours allegations. By Order dated June 29, 2018, the Regional Director of Region 22 dismissed the allegations in the Complaint alleging maintenance of unlawful handbook policies. After the parties settled all other allegations, a hearing was held on July 10, 2018, to address the *Total Security* discipline and the reduction of hours allegations. The parties stipulated to the necessary facts to raise to the Board the legal issue of whether *Total Security* should be overturned.

At the hearing, the General Counsel articulated two theories for the Complaint allegation that “[s]ince about February of 2013, Respondent has unilaterally decreased bargaining-unit employees’ hours” without “providing notice to the Union and without affording the Union an opportunity to bargain....” The first, and primary, theory of liability articulated by the General Counsel was that Respondent unilaterally changed its hiring practices to only start hiring employees at 37.5 hours per week instead of 40 hours per week. After reviewing the evidence presented by Respondent at the hearing, the General Counsel abandoned this theory of liability. The second, and secondary, theory of liability (the General Counsel did not even discuss this theory in its opening statement before the judge) was that the Center decreased the hours of 20 bargaining unit employees. In support of this allegation, the General Counsel did not present any witnesses. Rather, the General Counsel relied solely on a demonstrative exhibit and a small sample of payroll records for each employee. Based solely on admittedly inconsistent and ambiguous patterns gleaned from the very limited payroll records, the judge erroneously found that the General Counsel set forth a prima facie case. However, the General Counsel’s limited evidence fell far short of proving a prima facie case, and was thus insufficient to prove that Respondent unilaterally reduced the bargaining unit employees’ hours in violation of Section 8(a)(5).

B. Summary of Facts

1. Background

Respondent is a rehabilitation and nursing facility located in New Milford, New Jersey, with over 200 beds available for residents. (GC Exh. 4; Tr. 82). The highest ranking employee at the Center is the Administrator, who is licensed by the state of New Jersey to run a skilled nursing facility, such as the Center. (Tr. 56-57). The Administrator is responsible for the day-to-day operations of the Center and makes all final decisions regarding resident care and the employees who work at the Center. (Id.)

On March 9, 2012, the Union won a representation election in Case 22-RC-073078 to represent a bargaining unit of the following job positions at the Center: Licensed Practical Nurses (LPN), Certified Nursing Assistants (CNA), Dietary Aides, Housekeepers, Laundry Aide, Porters, Recreation Aides, Restorative Aides, Rehabilitation Techs, Hospitality Aides, Central Supply Clerks, Unit Secretaries, Receptionists, Maintenance Workers, and Porters. (GC Exh. 1(d), (g); GC Exh. 2). To challenge the Board's decision overruling the Center's objections, the Center refused to recognize or bargain with the Union, prompting a charge from the Union in Case 22-CA-097938 on which the Board issued summary judgment. (GC Exh. 2(m) reported at 361 NLRB No. 117 (2014)).

Respondent appealed to the D.C. Circuit, but in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the appeal was delayed when the Board set aside its decisions in Cases 22-CA-097938 and 22-RC-073078. The Board reaffirmed these decisions on June 15, 2015 (GC Exh. 2(n) reported at 362 NLRB No. 114 (2015)), the Center again appealed to the D.C. Circuit on July 7, 2015, and, on January 24, 2017, the D.C. Circuit upheld the Union's certification and ordered Respondent to bargain with the Union. (GC Exh. 2(o)). Following some

preliminary discussions and Respondent producing a voluminous amount of requested information to the Union, the parties met for their first bargaining session on May 11, 2017.

2. The Parties Stipulated to the Facts Relevant to a Liability Determination Under *Total Security*

The parties stipulated to the facts surrounding the four (4) disciplines at issue in the case, as relevant to determining whether Respondent violated Section 8(a)(5) under extant Board law in *Total Security*.² The Center did not provide the Union with notice or an opportunity to bargain prior to issuing the discipline at issue (suspensions occurring on October 10, 2016, February 1, 2017, and March 23, 2017 to three (3) different employees, and a termination of another employee on January 4, 2017). (Id.; GC Exh. 4 ¶ 1). On June 2, 2017, the Center notified the Union of this discipline in the course of bargaining with the Union. (GC Exh. 4 ¶ 2). However, the Union has never requested bargaining over this discipline, despite the fact that: (1) all of the discipline at issue were relatively recent (as little as three (3) months prior to the Center and Union beginning bargaining, and, at most, eight (8) months prior); (2) the Union has requested bargaining over multiple disciplines that took place after May 1, 2017; and (3) the Center has engaged in such bargaining when requested. (Id. ¶ 3, 5).

² Prior to the hearing, Respondent confirmed with Region 22 that the only facts relevant to the hearing for the *Total Security* discipline allegations were facts relevant for making a determination of liability under *Total Security* (that Respondent violated Section 8(a)(5) because it did not provide the Union notice and an opportunity to bargain prior to issuing the discipline). Moreover, the issue of whether the serious discipline was taken for cause would be reserved for the compliance stage of the proceeding, if necessary. The parties memorialized this understanding in a stipulation. (GC Exh. 4 ¶ 6). Respondent maintains that, had the issue been ripe and relevant before the judge, Respondent would have presented evidence that under pre-*Total Security* Board law, Respondent did not violate Section 8(a)(5), and Respondent maintains that, regardless, it took all discipline referenced in the Complaint for “cause.”

3. The General Counsel did not Prove that Respondent Unlawfully Reduced the Hours of 20 Bargaining Unit Employees

a. The General Counsel's Case

The General Counsel's allegations in the Complaint regarding alleged reduction in hours merely state that "[s]ince about February of 2013, Respondent has unilaterally decreased bargaining-unit employees' hours" without "providing notice to the Union and without affording the Union an opportunity to bargain...." (Compl. ¶¶ 19-20). In its case in chief, as substantive evidence in support of these allegations, the General Counsel entered into evidence a chart that listed 20 employees (the Chart)³ and, per the Chart's title, alleged these were employees "[w]hose [h]ours [w]ere [d]eceased." (GC Exh. 10(a)). Among other information, the Chart listed the pay period in 2014 or 2015 (not 2013) in which the 20 employees' hours were allegedly decreased, and the "standard hours" of the employees for each year of their employment, with their "standard hours" going from 40 to 37.5 (in one case, 38) in the year in which their hours were allegedly reduced. (Id.)

The General Counsel claimed the information in the Chart was supported by the limited number of payroll registers the General Counsel also submitted into evidence, which consisted only of payroll registers from approximately five (5) or six (6) pay periods prior to the date the Chart demarcated these employees' hours were allegedly reduced, and approximately five (5) or six (6) pay periods after this date. (GC Exh. 10(b)-(h); Tr. 17-18). However, neither the General Counsel nor the Union called any witnesses to explain the information in the Chart, such as how

³ Which consisted of seven (7) Dietary Aides (Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Vicente Ricarze, Allan Tolentino, and George Varghese), three (3) Housekeepers (Desinette Bazile, Julianne Benoit, Paulette Murray), two (2) Laundry Aides (Charles Abouzeid and Jean Ramkhalawan), one Porter (Edgardo Irabon), one Maintenance Worker (Andrew Hegarty), five (5) Recreation Assistants (Mariamma Abraham, Rosilin Bobby, Sara Jiminez, Donna Timms, and Shiril Tom), and one Receptionist (Dawn-Marie Sormani). (GC Ex. 10(a)).

the payroll period where an employee's hours were allegedly decreased was determined, what the term "standard hours" meant,⁴ how the information in the Chart related to the General Counsel's allegation in the Complaint that the reduction in hours occurred "[s]ince about February 2013," or how any information from the Chart for a time period other than what was supported by the underlying payroll records can possibly be determined. In fact, neither the General Counsel nor the Union called any witnesses at all, despite the fact that many of the 20 employees at issue are still current employees, and one—Andrew Hegarty—is part of the Union's bargaining committee.

b. Respondent's Case

i. Respondent's witness, Maureen Montegari

For its case, Respondent called Maureen Montegari (Montegari), currently the Vice President of Human Resources for Care One Management, LLC. (Tr. 21-22). In January 2010, Montegari began as a Regional Director of Human Resources. (Tr. 20-21). In this role, Montegari reported to the Vice President of Human Resources and provided day-to-day human resources services to a region of nursing facilities, which included the Center. (Tr. 21-22). In 2012, Montegari was promoted to her current role as Vice President of Human Resources, where she now supervises the Regional Directors of Human Resources, including the Regional Director of Human Resources covering the Center. (Tr. 22-23). In her role as both Regional Director of Human Resources and Vice President of Human Resources, Montegari was familiar with the Center's payroll, scheduling, and hiring policies, and the Center's operational needs as it relates to human resources. (Tr. 23). As both the individual responsible for day-to-day human resources for the Center, and then as the individual supervising the Regional Director responsible for day-to-

⁴ For example, whether the term meant alleged guaranteed hours, alleged scheduled hours, alleged hours worked, or something entirely different. In fact, the term "standard hours" had no actual basis in any of the underlying documents. (See GC Exh. 10(b)-(h)).

day human resources for the Center, it was Montegari's responsibility to be familiar with all aspects of the Center's human resources and human resources policies.⁵ (Id.) Montegari has a comprehensive understanding of the Center's scheduling policies, as well as the staffing and scheduling at the Center through her interaction with the Center's management team and her observations of and knowledge of the Center. (Tr. 64-65, 73-74, 86-87). In addition, as Vice President of Human Resources, Montegari has been responsible for approving and/or updating human resources policies, such as policies governing payroll, scheduling, and hiring practices. (Tr. 89-90).

Not only was Montegari's testimony uncontroverted (because the General Counsel did not call any witnesses to testify), Montegari's testimony is even more credible and her knowledge of the relevant facts even more secure because the General Counsel, after reviewing Montegari's testimony, abandoned its primary theory that the Center violated Section 8(a)(5) by unilaterally changing the schedules of full-time employees it hired from 40 hours per week to 37.5 hours per week. (See General Counsel's Post-Hearing Brief, p. 1 fn. 3; Respondent's Post-Hearing Brief, p. 1, fn. 3; Tr. 8-9). Essentially, by admitting defeat on its primary theory of liability, the General Counsel acknowledged that Montegari's testimony should be accepted *fully and completely*.

ii. The Center's Wage & Benefit Summary and scheduling policy

Montegari testified that every new hire receives a copy of the Center's Wage & Benefit Summary at the beginning of their employment, and each employee is supposed to sign the Wage & Benefit Summary acknowledging receipt of it. (R. Exh. 1; Tr. 25). The Wage & Benefit Summary contains information on wages, work hours, paid sick and vacation time, health

⁵ As Montegari unequivocally and explicitly testified, "It's [her] job to be familiar with the scheduling and the HR operations of the facility." (Tr. 29). On the other hand, CCG presented no testimony disputing Montegari's testimony or that would impeach her credibility or knowledge, or succeeded in any way in impeaching her credibility or knowledge on cross examination.

insurance, retirement benefits, and leave benefits, among other information, for the Center's employees. (R. Exh. 1). Montegari testified that the Wage & Benefit Summary entered into evidence as R. Exh. 1 went into effect on May 1, 2009 (the 2009 Wage & Benefit Summary), replacing a previous version. (R. Exh. 1; Tr. 25, 65-66). The 2009 Wage & Benefit Summary remains substantively in effect, except for minor formatting changes and changes to update the document to comply with the law. (Tr. 25-26).

Per the 2009 Wage & Benefit Summary, the Center has four (4) categories of employees, which are based on the hours they regularly work: (1) Full-Time employees; (2) Part-Time Benefits Eligible employees; (3) Part-Time Not Benefits Eligible employees; and (4) Per Diem employees. (R. Exh. 1 p. 2; Tr. 26). Full-Time employees "[r]egularly work[] 37.5 hours or more per week," Part-Time Benefits Eligible employees "[r]egularly work[] 24 hours to less than 37.5 hours per week" (and are eligible for pro-rated benefits – i.e. vacation, sick time, health and retirement benefits), and Part-Time Not Benefits Eligible employees "[r]egularly work[] less than 24 hours per week." (R. Exh. 1 p. 2). Per Diem employees are hired on an as needed basis to fill in uncovered shifts, such as to cover vacations or recently vacated positions. (R. Exh. 1 p. 2; Tr. 26-27). It is the Administrator's decision whether to hire a Full-Time, Part-Time (either Benefits Eligible or Not Benefits Eligible), or Per Diem employee, which is based on the needs of the Center and the number of hours it would need that employee to work. (Tr. 26).

Nothing about the 2009 Wage & Benefit Summary regarding hours worked or scheduling changed after May 1, 2009, or after the Union's certification in March 2012. (Tr. 30-31). Accordingly, the terms of the 2009 Wage & Benefit Summary represented the status quo prior to the Union's certification that the Center was required to maintain after the Union's certification. Notably, the 2009 Wage & Benefit Summary does not set a minimum number of hours an

employee will work, let alone guarantee that employees will always work a minimum number of hours in a given week. Rather, it only provides that employees *regularly* work a certain number of hours based on their category. (R. Exh. 1; Tr. 47-50, 66-67). For instance, the 2009 Wage & Benefit Summary describes how the Center will conduct audits to ensure that an employee's actual hours worked are in line with their status, and it makes clear that an employee's status will be adjusted to match their hours worked, and not that an employee will be guaranteed a certain number of hours within or to match their category. (R. Exh. 1 p. 2).

Moreover, Montegari testified that although an employee's schedule should drive the actual hours employees work, employees could work more or less than their scheduled hours. (Tr. 47-50, 66-67, 72-76). Similarly, because payroll registers show the hours an employee actually worked, payroll registers will not necessarily reflect what an employee was scheduled to work, and employees' actual hours as reflected on their payroll registers could be more or less than their original scheduled hours.⁶ (Tr. 47-50, 66-67, 72-76). As Montegari's testimony clearly shows, the 2009 Wage & Benefit Summary—without a guarantee or minimum number of set hours—represented the status quo as of the Union's certification that Respondent was required to maintain.

iii. Any reduction in Sormani's hours was taken in conjunction with a position change

The evidence presented by Respondent shows that any reduction in the hours or change in the schedule of Sormani appears to have occurred in conjunction with a position change from Unit Secretary to Receptionist. As Montegari testified (and which went un rebutted by the General Counsel), the Receptionist position, consistent with the Center's 2009 Wage & Benefit Summary

⁶ Respondent notes that even the payroll registers from the pay periods prior to when Respondent allegedly reduced the 20 employees' hours (as demarcated in the Chart) show a fluctuation in hours actually worked, which demonstrates that there was never a guarantee of a Full-Time employee working 40 hours per week. (GC Exh. 10(b)-(h)). The Judge acknowledged this, as well. (Decision, p. 4, lines 34-43, Appendix B).

that went into effect on May 1, 2009, would have been regularly scheduled at 37.5 hours per week. (Tr. 44-46). Indeed, the other Receptionist hired, Iren Helen Dobridge, was hired at a regular schedule of 37.5 hour per week, as well. (R. Exh. 2). Moreover, the General Counsel admitted in its own demonstrative exhibit that Sormani changed positions to Receptionist in 2015, when the General Counsel alleges her hours were reduced.⁷ (See GC Exh. 10(a)). In fact, the judge referred to Sormani as a Receptionist. (Decision, p. 3, line 1).

II. QUESTIONS PRESENTED

1. Whether the Board decision, *Total Security Management 1, LLC*, 354 NLRB No. 106 (2016), should be overturned. (Exceptions 25-27, 29).
2. Whether the judge incorrectly found that the General Counsel met its burden of proof of demonstrating a prima facie case that Respondent reduced the hours of 20 bargaining unit employees. (Exceptions 1-7, 9-18, 21-24).
3. If the General Counsel established a prima facie case, whether the judge incorrectly found that Respondent failed to rebut the General Counsel's prima facie case that Respondent unlawfully reduced Sormani's hours. (Exceptions 8, 19, 20).

III. SUMMARY OF ARGUMENT

In regards to the discipline allegations, the Center maintains that *Total Security*, for the reasons articulated by former Chairman Miscimarra in his dissent, was wrongly decided and should be overturned. The *Total Security* majority wrongly reasoned that an employer's imposition of serious discipline, regardless of whether that discipline was consistent with an employer's past disciplinary standards and procedures, constituted a "change" pursuant to Section 8(a)(5). While

⁷ Respondent also notes that Sormani's "Dept" code in her payroll registers changed from 303721 to 303702 in the payroll period ending May 9, 2015, which would indicate a change in department from the Nursing Department (which included the Unit Secretary position) to the Administration Department (which included the Receptionist position).

Total Security was incorrectly decided to begin with, it is most certainly inconsistent with the Board's later clarification of what constitutes a "change" pursuant to Section 8(a)(5) in *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017), which held that an employer's use of discretion that does not vary in kind or degree from past actions does not constitute a "change." In addition, *Total Security* is inconsistent with the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959 (1975) where the Supreme Court explicitly held that a union has no right to predisciplinary bargaining over discipline other than what it is able to secure in collective bargaining negotiations. Furthermore, *Total Security* is inconsistent with long-established Board principles, such as the distinction between "decision" and "effects" bargaining and the Board's "clear and unmistakable waiver" standard, and is practically unworkable. Lastly, even if *Total Security* was correctly decided in regards to determining liability (which it was not), *Total Security's* make-whole remedy is inconsistent with Sections 10(c) and 8(d), and should be overturned.

In regards to the allegation that Respondent unilaterally decreased the hours of 20 bargaining unit employees, the General Counsel failed to set forth a prima facie case that a Section 8(a)(5) violation occurred. The sole evidence upon which the General Counsel relied was a demonstrative exhibit and limited payroll records that supposedly demonstrated the 20 bargaining unit employees' "standard" weekly hours were decreased from 40 to 37.5. However, the limited payroll records demonstrated that the employees' hours fluctuated, both before and after the alleged "change." It is also completely uncontroverted that the status quo, as of the Union election, was that bargaining unit employees did not have a guarantee of weekly hours worked, only that Full-Time employees regularly worked 37.5 or more hours per week. The judge, in incorrectly finding these limited records, by themselves, set forth a prima facie case, reasoned these records

were sufficient to demonstrate a “pattern” that these employees’ hours were reduced. But by the judge’s own admission, any patterns to be adduced from these limited records were “not entirely consistent” and bordered on “ambiguous.” Inconsistent and ambiguous patterns are not sufficient to prove, by a preponderance of the evidence, that the 20 bargaining unit employees’ hours changed in “kind or degree” in violation of Section 8(a)(5). Moreover, the General Counsel failed to call *any* of the 20 bargaining unit employees to testify, or provide any other evidence, that any fluctuation in hours were the result of *Respondent’s* actions. Accordingly, the judge’s finding of a Section 8(a)(5) violation in the absence of sufficient evidence by the General Counsel was entirely based on impermissible guesswork and assumptions.

IV. ARGUMENT

A. *Total Security* Should be Overturned (Exceptions 25-27, 29)

In 2016, in its *Total Security* decision, the Board reversed 80 years of well-settled precedent to drastically alter employer requirements for imposing serious discipline (suspensions and discharges) on employees represented by a union but not covered by a collective bargaining agreement. The Board’s new legal precedent is contrary to existing law, runs counter to well-established legal principles governing the Act, and is practically unworkable. Ultimately, *Total Security* should be overturned for two (2) reasons: (1) *Total Security* incorrectly determined that an employer has the statutory obligation to bargain with the union prior to imposing serious discipline (suspension or discharge); and (2) to the extent such statutory authority exists (which it does not), the Board wrongly determined that a make-whole remedy, including reinstatement and back pay, was the correct remedy for a violation. Indeed, Member Miscimarra, in dissent, recognized the issues with *Total Security* raised by Respondent herein, and his dissent provides a

clear framework by which *Total Security* was wrongly decided and should be overturned.⁸ See 354 NLRB No. 106, slip op. at 17-44.

1. *Total Security* Incorrectly Determined that an Employer has the Statutory Obligation to Bargain with the Union Prior to Imposing Serious Discipline

- a. *Total Security* wrongly imposed an 8(a)(5) obligation on an employer to bargain over discipline even when there is no “change” as defined by Board law

Consistent with Section 8(a)(5) and the Supreme Court’s seminal decision in *NLRB v. Katz*, 369 U.S. 736 (1962)—prohibiting an employer from making unilateral changes to bargaining unit terms and conditions of employment without providing the union notice and an opportunity to bargain—it is uncontroverted that an employer would violate Section 8(a)(5) by unilaterally implementing a change in disciplinary standards or procedures. See *Total Security*, 364 NLRB No. 106, slip op. at 25-26. However, as Member Miscimarra recognized in his *Total Security* dissent (see *id.*, slip op. at 25-28), an employer should not be found to violate Section 8(a)(5) by merely taking disciplinary action consistent with its already-established disciplinary standards and procedures that represent the status quo.⁹ This is consistent with the Board’s adoption of the “dynamic status quo” concept, which reasons that the employer taking actions consistent with what has occurred in the past is not a “change,” but a maintenance of the status quo. See *id.*, slip op. at

⁸ Moreover, General Counsel Robb recognized *Total Security* cases as those for which the General Counsel should provide the Board with an alternative analysis. See GC Memo 18-02.

⁹ For example, the four (4) disciplines at issue in this case were: (1) a termination for the employee falsifying time entries; (2) a one-day suspension for the employee not wearing proper attire while caring for residents; (3) a two-day suspension for the employee playing a game on their cell phone during their shift instead of working; and (4) a two-day suspension for the employee telling a resident to “shut up.” Had it been relevant before the ALJ (which would have been the case under pre-*Total Security* law), the Center would have introduced evidence demonstrating that the Center has always considered falsifying time entries, failing to wear proper attire during resident care, taking unauthorized breaks while clocked in, and telling a resident to “shut up” to be serious, disciplinable offenses.

26.¹⁰ As Member Miscimarra pointed out in his dissent, an illustrative example is wage increases—“when an employer has a past practice of providing certain wage increases, an employer does not violate Section 8(a)(5) when it provides new wage increases in keeping with that practice without bargaining.” *Id.* citing *Daily News of Los Angeles*, 315 NLRB 1236 (1994). Similarly, where an employer has a past practice of disciplining employees for certain offenses and through certain procedures, an employer does not violate Section 8(a)(5) by deciding to discipline employees for those same offenses utilizing the same procedures. The majority in *Total Security*, however, primarily and incorrectly focused on the idea that if an employer’s decision involves *any* degree of discretion, the employer must bargain with the Union over that decision—even if the action taken by the employer was to maintain the status quo. See *id.*, slip op. at 4-7, 11.

Moreover, although *Total Security* was incorrectly decided to begin with, *Total Security* is certainly inconsistent with the Board’s recent holding in *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017), clarifying and setting what constitutes a “change” in terms and conditions of employment such that an employer could be found to violate Section 8(a)(5). In *Raytheon*, the Board held that “an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.” *Raytheon*, slip op. at 16. In so holding, the Board overturned its decision in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (“*DuPont*”), decided the same day as *Total Security*, which had dramatically altered what constitutes a “change” requiring notice

¹⁰ See also Robert A. Gorman, Mathew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013) (“[T]he case law (including the Katz decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer’s ‘change’ is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a ‘change’ in working conditions at all.”)

to the union and the opportunity for bargaining prior to implementation. The Board in *Raytheon* criticized *DuPont* for concluding, like how the majority reasoned in *Total Security*, that “every action constitutes a ‘change’ within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer’s actions involve any ‘discretion.’” *Raytheon*, slip op. at 13. Instead, the Board in *Raytheon* correctly focused on the “dynamic status quo” concept (as Member Miscimarra did in his *Total Security* dissent) and correctly evaluated what constituted a “change” “by comparing the challenged action to the employer’s past actions.” *Id.*, slip op. at 5-6 fn. 23, 24, 13.

The Board’s standard in *Total Security* is thus inconsistent with *Raytheon*. Under the Board’s *Total Security* standard, there would be no need for a comparison between the kind and degree of discipline the employer wishes to impose and the kind and degree of discipline the employer has a past practice of imposing (the “change”, as contemplated by Member Miscimarra’s dissent and the *Raytheon* decision). Instead, an employer *must* bargain with the Union before deciding to impose serious discipline, even if the discipline would be similar in kind and degree to discipline customarily taken in the past. Therefore, as the Board in *Raytheon* overturned the *DuPont* decision, the Board here should overturn the similarly reasoned *Total Security* decision.

b. Total Security is contrary to the Supreme Court’s Weingarten Decision

As Member Miscimarra note in his dissent (see *Total Security*, slip op. at 28-31), the requirements placed on employers by *Total Security*—that they provide the union notice and an opportunity to bargain prior to imposing discipline—are contrary to Supreme Court precedent in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (“*Weingarten*”). Indeed, the plain language of the Supreme Court’s *Weingarten* decision is contrary to *Total Security*. Most explicitly, the Supreme Court, quoting the Board’s decision in *Mobil Oil*, 196 NLRB 1052 (1972), stated that

“we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations.” *Weingarten*, 420 U.S. at 259. But that is exactly what *Total Security* does, contrary to binding Supreme Court precedent—provide the union with particular rights regarding predisciplinary discussions or decisions which it has not been able to secure during collective bargaining negotiations. Moreover, the Supreme Court, quoting the Board’s decision in *Quality Mfg. Co.*, 195 NLRB 197, 198-99 (1972), recognized that absent some collectively bargained obligation, the employer “would, of course, be free to act” and “a collective course is not required.” *Id.* Lastly, in providing employees with the right to a union representative at a disciplinary interview, the Supreme Court specifically placed limits on the union’s rights—“the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.” *Id.* at 260. But *Total Security* would require the employer engage in such pre-decision bargaining with the union.

As Member Miscimarra pointed out in his dissent, the *Total Security* majority took great pains to try to—unsuccessfully—conform its decision to *Weingarten*. The majority reasoned that *Total Security* does not conflict with *Weingarten* because “the obligation to provide the union with notice and an opportunity to bargain arises *after* the employer has decided, at least preliminarily, that discipline is warranted, but before the employer has actually imposed discipline.” *Total Security*, slip op. at 7 fn. 17 (emphasis in the original). But later, the Board, in attempting to make its decision at least somewhat workable for employers, stated that once the employer has given notice to the union, it need not bargain to agreement or impasse before imposing the discipline (so long as the employer and union continue to bargain). See *id.*, slip op. at 8. It thus appears that the

majority in *Total Security* walked back its entire justification for comporting its reasoning with *Weingarten*.¹¹

*c. Total Security creates a new paradigm of bargaining that is neither
“decision” bargaining nor “effects” bargaining*

As Member Miscimarra noted in his dissent (see *Total Security*, slip op. at 31-32), the Board has traditionally recognized two types of bargaining—“decision” bargaining and “effects” bargaining. “Decision” bargaining traditionally takes place *before* the decision is made—the purpose of the bargaining is to discuss the decision, itself, and any information or reasoning that could potentially influence the decision (that has yet to be made). See *id.* “Effects” bargaining, on the other hand, takes place *after* the decision has been made and the union informed, but *before* the decision implemented—the purpose of the bargaining is not to discuss alternatives to the underlying decision, but simply to discuss the impact of the decision on the employees. See *id.*

But *Total Security* creates a third type of “hybrid” bargaining that has never before been recognized by the Board and is inconsistent with Board principles. The discipline contemplated by *Total Security* requires the employer to make a decision in the first instance, but then requires bargaining regarding the underlying decision *after* the decision has been made but before it has been implemented. See *Total Security*, slip op. at 7 fn. 17. This type of bargaining makes no sense and runs contrary to the purpose of decision bargaining:

¹¹ Lastly, as Member Miscimarra noted in his dissent, the Board took the position in the *Weingarten* case that “the duty to bargain does not arise prior to the employer’s decision to impose discipline,” which was then accepted by the Supreme Court. *Total Security*, slip op. at 30 quoting *Weingarten*, Brief for the Board, 1974 WL 186290 (U.S.). The majority in *Total Security* tries to explain this away by stating that even if the Board had taken that position, “it is well established that the Board may change its position as long as it explains its rationale for the change,” which it supposedly did in *Total Security*. *Total Security*, slip op. at 7 fn. 17. But the issue is not that the Board has changed its position, but that the Board’s position before the Supreme Court in *Weingarten* was accepted by the Supreme Court and made binding law. It goes without saying that the Board cannot change its position to one that conflicts with Supreme Court precedent.

The underlying rationale for [decision bargaining] is that the Union—on behalf of and as representative of the employees—should be accorded an opportunity to engage in a full and frank discussion regarding such decisions. In this way parties are presented with an opportunity to explore possible alternatives to accommodate their respective interests and thereby to resolve whatever issue confronts them in a mutually acceptable way.... In this way, the law leaves undisturbed the parties’ sole right to determine the substantive terms of their relationship while also guaranteeing, at the very least, the right of each party—in this instance particularly that of the Union—to have an opportunity to influence the final decision.

Brockway Motor Trucks, 230 NLRB 1002, 1003 (1977). Bargaining pursuant to *Total Security*, though, does not allow for give and take between the employer and the union over what the correct decision should be or provide the union with any meaningful avenue to explore possible alternatives that meets the parties’ interests. By triggering the *Total Security* obligation to bargain, the employer has *already decided* that the correct final decision that meets its interests is suspension or termination. All *Total Security* does is provide a legal framework for the union to try to change the employer’s mind by second guessing the employer’s decision, which is not productive decision bargaining as the Board has described it.

d. Total Security is inconsistent with the Board’s “Clear and Unmistakable Waiver” standard

As Member Miscimarra noted in his dissent (see *Total Security*, slip op. at 32-33), the novel framework created by *Total Security* is at odds with the Board’s fundamental and long-established “clear and unmistakable waiver” standard. The majority in *Total Security* provides employers with a “safe harbor” that extinguishes the obligation to bargain prior to imposing serious discipline by negotiating a grievance and arbitration procedure into a collective bargaining agreement. See *id.*, slip op. at 9 fn. 22. However, the majority’s adoption of such safe harbor—while practically necessary to allow the “typical” grievance and arbitration provision in collective bargaining agreements to maintain their significance—demonstrates that the *Total Security* framework has no basis in Board precedent and is essentially an arbitrary system devised out of whole-cloth.

Prior to *Total Security* effectively carving out discipline from this standard, the general rule has been that to find a “clear and unmistakable waiver,” the Board

requires bargaining partners to *unequivocally and specifically express* their mutual intention to permit unilateral employer action with respect to a particular employment term.... In order to find a waiver based on contractual language, *that language must be sufficiently specific*. Further, while waiver of a statutory right may be evidenced by bargaining history, the Board requires the matter to have been fully discussed and consciously explored during negotiations and the *union to have consciously yielded or clearly and unmistakably waived its interest in the matter*.

Graymont PA, Inc., 364 NLRB No. 37, slip op. at 2 (2016) (emphasis added) (quotations and citations omitted). The Board has also consistently taken the position that a “typical” grievance and arbitration provision is not a “clear and unmistakable waiver” of the statutory duty to bargain that otherwise exists. See *Total Security*, slip op. at 32-33, fn. 123 (citing numerous cases where Board has held that grievance and arbitration provision in CBA does not constitute a clear and unmistakable waiver). However, under *Total Security*, the Board would allow a “typical” grievance and arbitration provision to suffice as a “clear and unmistakable waiver” of the union’s right to bargain *before* an employer-imposed discipline, which is contrary to the above, long-held Board principles.¹² Accordingly, *Total Security* is, again, contrary to Board precedent.

¹² The *Total Security* majority likely invented this “safe harbor” because it recognized the dramatic effect its decision would have on the vast majority of collective bargaining relationships if traditional Board precedent and principles applied. Unions party to “typical” collective bargaining agreement grievance and arbitration procedures would no doubt argue that these provisions do not “clearly and unmistakably waive” the statutory requirement to bargain before imposing serious discipline, which would act as a destabilizing force in labor relations across the country. Indeed, the *Total Security* majority seems to recognize the incongruity of this “safe harbor” (even if likely unintentionally), when it discussed allowing the “safe harbor” for interim grievance procedures during bargaining that “provid[ed] for some mutually satisfactory alternative” to pre-imposition bargaining. *Total Security*, slip op. at 9 fn. 22. For these types of “interim procedures,” the majority specifically stated that an “employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim agreement *expressly waiving* the union’s right to pre-imposition bargaining....” *Id.* (emphasis added). But for “typical” grievance and arbitration agreements negotiated into collective bargaining agreements, the Board finds no need for the statutory right to pre-imposition bargaining to be “expressly waived.”

e. Total Security violates Section 8(d) and exceeds the Board's remedial authority

Not only does the “safe harbor” invented in *Total Security* violate the Board’s “clear and unmistakable waiver” standard (as discussed in Section IV.A.1.d, above), it also runs afoul of Section 8(d), which prohibits the Board from requiring an employer or union to “agree to a proposal or require[ing] the making of a concession.” As Member Miscimarra noted in his dissent (see *Total Security*, slip op. at 41), the “safe harbor”—the majority’s suggested exchange of waiving the bargaining obligation for an interim grievance and arbitration procedure—is the equivalent of the Board improperly stating its opinion as to what it views as a fair compromise or agreement. Indeed, the Board seems to have gone so far as to impose this new bargaining obligation for the *very purpose* of pressuring employers to commit to interim grievance and arbitration procedures, lest they be required to navigate these novel and complicated bargaining obligations. *Id.* The *Total Security* majority thus improperly goes beyond its statutory authority “to oversee and referee the process of collective bargaining” to the point where it improperly “compels agreement” of an interim grievance and arbitration procedure. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

f. Total Security is practically unworkable

As *Total Security* imposed its pre-imposition bargaining obligations on employers for the first time, Member Miscimarra in dissent could not fully expound on the negative practical issues with the Board’s *Total Security* obligations. However, the obligations and requirements that *Total Security* imposes on employers are practically unworkable and turn run-of-the mill discipline—that the Board and Supreme Court have recognized as an important employer right¹³—into an

¹³ See, e.g. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 798 (1945) (“Opportunity to organize and proper discipline are both essential elements in a balanced society”); *Star-News Newspapers, Inc.*, 183 NLRB 1003, 1004 (1970) (“The Act’s grant of rights to employees to engage in organizing activities, to belong to a union, and to engage in collective bargaining was

unworkable maze of legal obligations. Although the *Total Security* majority assured that these obligations were “not an unreasonable burden” (see *Total Security*, slip op. at 8-11), the exact opposite is true.

As a general principal, employers wish to impose serious discipline when something serious happens in the workplace that warrants such discipline. This concern is especially acute for employers in the health care industry, such as Respondent, when employees’ duties are to care for the lives of the employer’s patients and residents—and employees’ failure, inability, unwillingness, or refusal to perform their duties, or any other action that would interfere with those duties, can have deadly consequences. Therefore, it is counterproductive for an employer, when having to make decisions because something serious and negative has happened in the workplace, to have to jump through convoluted legal hoops to effectively manage its business and effectively deal with the consequences of those serious employee actions.

As a first step, if the employer wishes to discharge an employee, the employer is left with the unenviable decision of having to determine whether exigent circumstances exist such that the employee can be discharged immediately, or allowing an employee to continue working while the employee already knows that the employer has decided to discharge them. More accurately, this determination is not necessarily whether exigent circumstances exist, but whether the employer can *prove*, in an unfair labor practice proceeding, that exigent circumstances exist, as that decision is likely to be challenged by the union and General Counsel in any unfair labor practice case. Again, in the context of the healthcare industry, leaving a poor performer or an employee who knows he or she is about to be fired to take care of residents could endanger resident well-being, but it is hard to imagine the union accepting the position that exigent circumstances exist simply

not intended to deprive management of its right to manage its business and to maintain production and discipline.”).

because an employee is a poor performer or the employer does not feel comfortable with an employee with one foot out the door caring for residents.

Next, assuming the employer provides notice and the opportunity to bargain with the union, the ensuing unenviable decision the employer has to make is how long it must wait before it implements the discipline—in other words, how long is “sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen”? *Total Security*, slip op. at 8. The *Total Security* majority does not say. In the meantime, a potentially soon-to-be-discharged employee waits in limbo (which can have negative effects on the employee, as well, such as delaying the ability to receive unemployment or search for a new job). Lastly, the employer then must determine when it has reached impasse with the union. But this bargaining is unlike any other type of bargaining an employer undertakes with the union—as discussed previously, the employer has *already* made its decision, it is not bargaining with the union over how the parties can address an open issue to meet each party’s needs. As such, this bargaining will inevitably result in the employer simply defending an already-made decision from union second-guessing.

Put together, the *Total Security* framework is completely unworkable for employers, and the practical end result is that employers’ right to maintain discipline in their workforce is diminished by the legal hoops through which they have to jump.

2. *Total Security* Incorrectly Allows for a Make-Whole Remedy

a. The Board’s make-whole remedy violates Section 10(c)

Even if *Total Security* correctly ruled that there is a statutory requirement for an employer to bargain with the union before implementing serious discipline, *Total Security*’s remedial framework for such violations—a make-whole remedy including back pay and reinstatement,

subject to the employer proving as an affirmative defense in a compliance proceeding that the discipline was taken for “cause”—violates the Act. In acknowledging that Section 10(c) prohibits the Board from requiring reinstatement or issuance of back pay to an employee who “was suspended or discharged for cause,” the majority in *Total Security* improperly narrowed this provision to only allow an employer to “raise an affirmative defense that reinstatement and backpay may not be awarded because the discipline was ‘for cause’ within the meaning of Section 10(c)...” *Total Security*, slip op. at 15. However, as Member Miscimarra noted in his dissent (see *Total Security*, slip op. at 33-39), *Total Security*’s limitation on Section 10(c) is inconsistent with Section 10(c)’s principles and is in direct contrast to Board precedent interpreting Section 10(c).¹⁴

As the Board recently described what constitutes “cause” pursuant to Section 10(c):

Cause, in the context of Sec. 10(c), effectively means *the absence of a prohibited reason*. For under our Act: ‘Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific qualification: it may not discharge *when the real motivating purpose is to do that which [the Act] forbids*.’

Cooper Tire & Rubber Company, 363 NLRB No. 194, slip op. at 11-12 (2016) (emphasis added) quoting *Anheuser-Busch*, 351 NLRB 645, 647 (2007). But *Total Security*’s standard and remedial framework are in direct contrast to this. *Total Security* would require make-whole relief without the Board presenting any evidence that there was a *prohibited reason* for the employer’s decision to suspend or discharge or that there was a *motivating purpose* to do that which the Act forbids. Instead, by virtue of not bargaining before imposing such discipline, *Total Security* improperly places a *presumption* that the employer acted with a prohibited reason or forbidden motivating

¹⁴ In addition, for the reasons noted by Member Miscimarra in his dissent, *Total Security* is also contrary to the legislative history of Section 10(c) (see *Total Security*, slip op. at 33-36) and *Total Security*’s consignment of the “cause” issue to a compliance proceeding is contrary to Section 10(c) (see *id.*, slip op. at 37-39).

purpose and requires that the employer prove a negative—the absence of a prohibited reason or a forbidden motive. The Board’s faulty reasoning is best exemplified by the fact that its justification for imposing this presumption and burden completely misstates this definition of “cause” and what actually needs to be proven. The *Total Security* majority argues that because the employer investigated the misconduct that led to the discipline, the employer would best “situated to prove that misconduct occurred and was the reason for the discipline....” *Total Security*, slip op. at fn. 41. But “misconduct” is not the same as “cause”—an employer need not prove *misconduct* for the employer to have had “cause” for the discipline.¹⁵ In fact, applying the Board’s logic to the actual definition of “cause,” the burden is best placed on the party proving the presence of a prohibited reason or forbidden motive, rather than the party who would have to prove the absence of one.

Moreover, the mechanics of *Total Security*-required bargaining are incongruous with the idea of “cause” being an affirmative defense where the burden of proof lies with the employer. *Total Security* allows for the employer to make a decision that discipline is warranted in the first instance (i.e. that there is “cause” for the decision), and then places the burden on the union to present any exculpatory or mitigating information to the employer to try to change its mind. See *Total Security*, slip op. at 7, fn. 17, 9. In an unfair labor practice proceeding, though, all of a sudden the employer is presumed to not have “cause” to make the decision *Total Security* allows it to make in the first instance. It is no longer the Board or the union’s burden to demonstrate that the employer’s decision (which, again, the employer is allowed to make without any union input in the first instance) was incorrect, not to mention the much higher standard of being made without “cause.” However, as the Board has defined “cause” (see *Cooper Tire & Rubber Company*, slip

¹⁵ Similarly, even if placing the burden on the employer was appropriate, *Total Security*’s requirement that the employer must prove “that: (1) the employee engaged in *misconduct*, and (2) the *misconduct* was the reason for the suspension or discharge” goes far beyond the Board’s definition of “cause” as previously defined by the Board. See *Total Security*, slip op. at 15.

op. at 11-12), the determination of whether the employer had “cause” is measured by the reason and motivation of the employer *as of the time it made the decision to impose the discipline*. It is thus illogical, arbitrary, and contrary to this definition, for the employer’s actions *after* it made the decision to impose discipline (whether or not it actually imposed discipline before providing the union notice and an opportunity to bargain), to flip the burden of proof to the employer and create a presumption that the employer had unlawful reasons or motivation to impose discipline when it made that decision, as *Total Security* does.

In addition, *Total Security*’s stated remedies are in direct contrast to how the Board has previously interpreted Section 10(c). In *Taracorp*, the Board specifically held that make-whole relief for a Section 8(a)(1) *Weingarten* violation would be “contrary to the specific remedial restriction contained, in Section 10(c), the general framework of the Act, and, independent of those restrictions, constitutes bad policy.”¹⁶ 273 NLRB at 221-22. The reasoning of *Taracorp* applies seamlessly to the situation dealt with by *Total Security*. The Board in *Taracorp* divided employee discharges into three categories:

- First, there is the situation where an employee is discharged for engaging in protected concerted activity, which undoubtedly requires make-whole relief. *Id.* at 222.
- Second, there is the situation where an employee is discharged or disciplined for misconduct or any other nondiscriminatory reason, even though the employee’s Section 7 rights may have otherwise been violated in a context unrelated to the discharge or discipline, which undoubtedly *does not* require make whole relief. *Id.*
- Third, there is the situation where the reason for the discharge is an unfair labor practice, such as where the employer discharges employees in connection with

¹⁶ In addition to discussing Section 10(c), the Board in *Taracorp* also discussed that under the Act, “the Board may not order punitive remedies,” and that Board remedies should not “serve as a windfall to employees or employers.” 273 NLRB at 223. These lessons were apparently ignored by the *Total Security* majority.

subcontracting bargaining unit work without first bargaining with the Union (a Section 8(a)(5) violation). *Id.*

The Board then reasoned that an employer discharging an employee, despite also committing a *Weingarten* violation, would fit into the second category, for which no make-whole remedy was appropriate. *Id.* at 223. In such a situation, despite the unfair labor practice, the “employee is discharged for what the employer considers misconduct,” not for engaging in protected concerted activity (category 1) or for reasons that are, itself, an unfair labor practice (category 3). *Id.* As a result, the Board reasoned that “there simply is not a sufficient nexus between the unfair labor practice committed...and the reason for the discharge (*perceived misconduct*) to justify a make-whole remedy.” *Id.*

Similarly, the situation dealt with by *Total Security* also falls within category two, for which make-whole relief is not warranted.¹⁷ As in *Taracorp*, the decision to discipline the employee in a *Total Security* situation arises completely separately from a supposed unfair labor practice resulting from a failure to bargain after the decision to discipline has been made, but before implementing the discipline. In both *Total Security* and *Taracorp* situations, the employee has *already committed* the misconduct for which he or she will be disciplined, and the Board correctly reasoned in *Taracorp* that this subsequent unfair labor practice will not rescue and provide a windfall to the transgressor employee. Furthermore, unlike even in *Taracorp*, the decision to discipline in a *Total Security* situation must necessarily come *before* the failure to bargain that is the unfair labor practice¹⁸—in the case of failing to allow a *Weingarten* representative, the employer may not have made its decision, and can even use information gleaned during that

¹⁷ The *Total Security* majority did not seem to argue that the situation discussed would fit in either category 1 or category 3.

¹⁸ See *Total Security*, slip op. at 7 fn. 17 (“As explained elsewhere in this decision, the obligation to provide the union with notice and an opportunity to bargain arises *after* the employer has decided, at least preliminarily, that discipline is warranted....”) (emphasis in the original).

unlawful interview as a basis the discipline. It is thus illogical for the Board to say that the “nexus” between the discipline and the unfair labor practice is stronger in a *Total Security* situation than in the situation discussed in *Taracorp*.¹⁹

More recently, in *Anheuser-Busch*, the Board held that a make-whole remedy (including reinstatement and back pay) was precluded by Section 10(c) where the employer discharged employees for misconduct discovered because the employer unlawfully installed surveillance cameras without first providing notice to and bargaining with the union. See 351 NLRB 645. In other words, the Board held that Section 10(c) precluded reinstatement or back pay, despite a parallel Section 8(a)(5) violation. The Board reasoned that the employees’ actions were wrongful and the purpose of Section 10(c) was to prevent employees from receiving a windfall they should not be entitled to because of some related unlawful conduct by the employer.²⁰ *Id.*, slip op. at 647-49. The Board also reasoned that the proper remedy for such a situation—where the employer violated Section 8(a)(5) but the employees were discharged for “cause”—was simply an order requiring the employer to cease and desist from its unlawful conduct and to bargain with the

¹⁹ The *Total Security* majority’s reliance on *E.I DuPont de Nemours & Co.*, 362 NLRB No. 98 (2015) (see *Total Security*, slip op. at 14 fn. 36) only harms its position. In that case, the Board held that a make-whole remedy was appropriate where the conduct resulting in discipline took place during an interview rendered unlawful by the employer’s refusal to provide a *Weingarten* representative. But this is far afield from the situation discussed by *Total Security*. The analogous situation would be if an employee objected to the employer’s refusal to bargain with the union over discipline and was disciplined further for such objection. In such a situation, a make-whole remedy could be appropriate, but that is not the situation *Total Security* dealt with.

²⁰ The *Total Security* majority attempts to distinguish *Anheuser-Busch* by arguing that in *Total Security*, where the unfair labor practice stems from failing to bargain over the discipline, “the unfair labor practice is chronologically and causally inseparable from the discipline,” and that the “causal nexus” between the unfair labor practice violation and the discipline was substantially stronger than in *Anheuser-Busch*, where the unfair labor practice related to the tools the employer used to find evidence of the misconduct. *Total Security*, slip op. at 14-15. In actuality, though, the reverse is the case. Again, *Total Security* allows for the employer to make its decision regarding discipline prior to its obligation to bargain with the union.

Union,²¹ as opposed to the instant case where the judge ordered Respondent to reinstate and pay back pay to the employees without considering whether the employees were disciplined for “cause,” subject to Respondent being able to meet an undetermined burden of proof in a compliance proceeding.²²

b. The Board’s make-whole remedy violates Section 8(d)

The Board’s make-whole remedy also violates Section 8(d), which prohibits the Board from requiring an employer or union to “agree to a proposal or requir[ing] the making of a concession.” *Total Security* places an obligation on an employer to bargain with the union over the employer’s decision to impose discipline. As the *Total Security* majority stated, the reason for creating this statutory right is to “enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action.” *Total Security*, slip op. at 9. Undoubtedly, in this discussion of exculpatory information and alternative courses of action, the most extreme

²¹ Respondent notes that, as discussed in Section I.B.2, above, the parties stipulated that the issue of whether the referenced discipline was taken for cause would be reserved for the compliance stage of the proceeding, if necessary. (See GC Exh. 4 ¶ 6). Moreover, the parties stipulated that the Union never requested bargaining over the discipline.

²² The *Total Security* majority also incorrectly stated, based on an out-of-context quotation, that *Anheuser-Busch* explicitly distinguished itself from the pre-imposition bargaining situation dealt with by *Total Security*. *Total Security*, slip op. at 14-15. The *Total Security* majority asserted that the *Anheuser-Busch* Board confirmed that, supposedly consistent with *Total Security*, “a termination of employment that is accomplished without bargaining with the representative union is unlawful under Section 8(a)(5) and is not ‘for cause.’” Id. quoting *Anheuser-Busch*, 351 NLRB at 648. But the *Total Security* majority omitted the next sentence from *Anheuser-Busch* providing an example of what was meant: “Thus, when an employer has unilaterally subcontracted unit work and laid off unit employees, those actions are unlawful, and the Board can order reinstatement and back pay.” *Anheuser-Busch*, 351 NLRB at 648. The *Anheuser-Busch* Board was thus not referring to category 2, run-of-the-mill discharge similar in kind and degree to those an employer routinely makes (as *Total Security* does), but to large scale “changes,” such as subcontracting bargaining unit work, which is undeniably in category 3 and a mandatory subject of bargaining for which make-whole relief would be appropriate.

positions that can be taken by each side during bargaining are: for the employer, the discipline stands, and, for the union, the employee should be reinstated with full back pay.

Therefore, when the Board orders a make-whole remedy for such a failure to bargain, the Board is adopting the union's position of reinstatement and back pay and requiring that the employer agree and concede to the most extreme union proposal. But this is precisely what Section 8(d) forbids the Board from doing. In contrast, if an employer was found to have not bargained in good faith over wage rates, for example, the Board could not order make-whole relief to provide back pay for the time of the bad faith bargaining at the union's proposed wage rate, and instate that proposed wage rate for the employees going forward. The Board's attempts to resolve discipline bargaining in favor the union through a make-whole remedy similarly cannot stand.

3. Once the Correct Standard is Specified, the Case Should be Dismissed, or at Least Remanded to the Judge to Take Relevant Evidence, if Necessary

The parties stipulated to the facts needed to present the legal issue of whether *Total Security* should be overturned to the Board. Those facts were:

- The Center did not provide the Union with notice or an opportunity to bargain prior to issuing the four (4) disciplines at issue in the case, which occurred while the Center was challenging the Union's certification before the United States Court of Appeals for the D.C. Circuit.²³ (See GC Exh. 4 ¶ 1).
- The Center notified the Union of the discipline on June 2, 2017. (Id. ¶ 2).
- The Union has never requested bargaining over the four (4) disciplines at issue in the case, despite requesting bargaining over multiple disciplines that took place after May 1, 2017 and the Center engaging in such bargaining when requested. (Id. ¶¶ 4-5.)

Should the Board return to its pre-*Total Security* standard, as articulated in *Fresno Bee*, this case should be dismissed since the Union admitted to never requesting bargaining over the four (4)

²³ The disciplines occurred on October 10, 2016, January 4, 2017, February 1, 2017, and March 23, 2017.

disciplines at issue, despite the Center fully engaging in bargaining with the Union over other disciplines when requested. See *Fresno Bee*, 337 NLRB 1161, 1187 (2002) (“While Respondent has no obligation to notify and bargain to impasse with the Union before imposing discipline, Respondent has an obligation to bargain with the Union, *upon request*, concerning the discharges, discipline, or reinstatement of its employees.”) (emphasis added). Alternatively, to the extent that the Board feels the record evidence is insufficient to find that Respondent did not violate Section 8(a)(5), the Board should remand the case to the judge to reopen the record to take such relevant evidence.²⁴

Lastly, even if the Board continues to abide by its *Total Security* decision (which it should not), as discussed in Section IV.A.2, above, the remedies authorized by *Total Security* contradict the Act. Therefore, at the very least, the Board should reverse the judge’s make-whole remedy.

B. The Judge Incorrectly Found that Respondent Changed Employees’ Hours in Violation of Section 8(a)(5) (Exceptions 1-24)

1. The Judge Incorrectly Found that the General Counsel set forth a Prima Facie Case that Respondent Reduced the Hours of 20 Bargaining Unit Employees (Exceptions 1-8, 10-19, 22-24)

In his Decision, the judge erroneously held that the General Counsel—based on scant evidence presented without explanation—met its burden of proof to demonstrate a prima facie case that Respondent unlawfully reduced the hours of 20 bargaining unit employees. (Decision, p. 6, lines 9-35, p. 7, lines 1-23). The judge’s decision, however, was largely based on impermissible

²⁴ Such as evidence related to whether the four (4) disciplines at issue were similar in kind and degree to discipline taken by the Respondent previously, and, if necessary, whether the disciplines were taken for cause. This evidence was not fleshed out before the judge because it was not relevant to determining liability under the *Total Security* standard, which the judge was required to follow. The parties stipulated to the facts relevant to determining liability under the *Total Security* standard, such that Respondent could raise to the Board the legal issue of whether *Total Security* should be overturned.

guesswork and assumption gleaned from limited payroll records submitted into evidence by the General Counsel.

To begin with, Montegari testified—without any controverting evidence presented by the General Counsel—that the 2009 Wage & Benefit Summary, which went into effect in May 2009, represented the status quo as of March 2012 when the Union was certified as the employees’ bargaining representative. Per the 2009 Wage & Benefit Summary and Montegari’s uncontroverted testimony, Full-Time employees would *regularly work* 37.5 hours or more per week, and, even if an employee regularly worked more than 37.5 hours per week, the 2009 Wage & Benefit Summary *did not guarantee* that a Full-Time employee would work 40 hours (or any other amount, even just 37.5 hours) in any given week. (R. Exh. 1; Tr. 47-50, 66-67, 72-76). The judge wrongly “place[d] no significance on Montegari’s testimony or the wage and benefit summary to the extent they indicate that employees were generally scheduled to work 37.5 hours per week,” simply because “Montegari was not involved in specific scheduling decision which were made by administrators at the facility level.” (Decision, p. 7, lines 1-5). However, Montegari was the *only* witness who testified at the hearing, meaning her testimony was uncontroverted. Moreover, even if Montegari was not involved in specific decision making, her testimony in this regard and the significance of the 2009 Wage & Benefit Summary should not have been so easily disregarded. The judge acknowledged that Montegari had human resources responsibility for the Center and knowledge of the Center’s scheduling practices (Decision, p. 5, lines 12-25), and Montegari specifically testified that she was familiar with the Center’s payroll, scheduling, and hiring policies, and the Center’s operational needs as it relates to human resources. (Tr. 23). Most significantly, however, the 2009 Wage & Benefit Summary and Montegari’s testimony regarding Full-Time employees regularly working at least 37.5 hours per week were sufficient for the

General Counsel to abandon its primary theory of liability that the Center unilaterally changed the schedules of full-time employees it hired from 40 hours per week to 37.5 hours per week. (See General Counsel’s Post-Hearing Brief, p. 1 fn. 3; Respondent’s Post-Hearing Brief, p. 1, fn. 3). It is illogical that this evidence would have been potent enough for the General Counsel to abandon its primary theory of liability, but not potent enough for the judge to place any significance on it.

Thus, it is clear the status quo was that Full-Time employees were not guaranteed a certain number of hours worked per week, only that they *regularly work* 37.5 hours or more per week.²⁵ Indeed, the judge acknowledged that the 20 employees’ hours fluctuated both before and after the date of the alleged “change.” Therefore, to the extent the limited payroll registers submitted into evidence by the General Counsel show the 20 employees at issue working less than 40 hours in certain weeks, those hours do not represent a reduction that would qualify as a “change” in the status quo violating Section 8(a)(5). Instead, it is just a manifestation of the status quo where employees’ actual hours worked had minor fluctuations below and above their regular hours. See *Raytheon*, slip op. at 8, 16 (no “change” pursuant to Section 8(a)(5) for employer action that does not “materially vary in kind or degree from what has been customary in the past” because Board has not “required bargaining prior to an employer’s minor variations from actions taken in the past.”); *Superior Container, Inc.*, 276 NLRB at 532, 534-35 (1985) (no Section 8(a)(5) violation for alleged change in policy where policy was in effect prior to union’s certification, policy allowed for “flexibility in implementation,” and policy was, at all times, implemented in accord with its terms).

²⁵ It is for this reason that the judge’s finding that the 20 employees “worked 40-hour weeks” (Decision, p. 7 lines 3-4) is factually incorrect—there was absolutely no guarantee that any Full-Time employee worked 40 hours in a week.

Contrary to Board law, though, the judge erroneously found that the hours of the 20 employees changed by reaching for so-called “patterns” allegedly found in the limited payroll records. (Decision, p. 4, lines 34-43, p. 7, lines 22-23). But these so-called “patterns” are not variations that “materially vary in kind or degree,” as required by *Raytheon*. In fact, the judge acknowledged that “it was not uncommon” for employees to work 39 to 39.75 hours prior to the alleged “change,”²⁶ and up to 38.75 hours after the alleged “change.” (Decision, p. 4, lines 39-41). This difference of as little as 15 minutes per week cannot reasonably form the basis for a violation of Section 8(a)(5), especially where it is uncontroverted that employees had no guarantee of any hours, as established by the 2009 Wages and Benefits Summary and Montegari’s testimony. Moreover, the judge acknowledged that these so-called patterns were “not entirely consistent” and close to “ambiguous.” (Decision, p. 4, line 39, p. 5, line 9, p. 8, line 28). Inconsistent and ambiguous “patterns” cannot form the sole basis for a prima facie case that Respondent violated Section 8(a)(5). At best, General Counsel only demonstrated that Respondent *might* have engaged in an unfair labor practice, which is insufficient for the General Counsel to carry its burden. See *St. Louis Comprehensive Neighborhood Health Ctr.*, 248 NLRB 1078, 1084 (1980) (no “change” in employer work rule implicating Section 8(a)(5) because “General Counsel must prove his case by a preponderance of the evidence, and the mere chance that there is an ambiguity [in the work

²⁶ In fact, as even recognized by the judge, the hours worked for some of the employees fluctuated much more than this prior to the alleged change. For example, including paid time off, Abraham worked 12, 24, 31.75, and 36 hours in certain weeks prior to the alleged change; Benoit worked 32 hours in a week prior to the alleged change; Murray worked 32 and 32 hours in certain weeks prior to the alleged change; Sormani worked 34.75, 37.5, 37.75, and 38.25 hours in certain weeks prior to the alleged change; Tolentino worked 38.25, 38.25, and 15.75 hours in certain weeks prior to the alleged change; and Varghese worked 35.5 hours in a week prior to the alleged change. (Decision, Appendix B). The evidence that these employees’ hours fluctuated so greatly prior to the alleged “change” demonstrates that no “change” in hours per *Raytheon* could have been proven based solely on payroll records showing the employees worked less than 40 hours in several weeks prior to the alleged “change.”

rule] is insufficient to sustain this allegation.”). Indeed, the judge’s complete reliance on these inconsistent and ambiguous patterns essentially resulted in a presumption that Respondent violated Section 8(a)(5) and essentially put the burden on Respondent to prove otherwise, which is contrary to the Act.

The judge’s impermissible grasping for a “pattern” reached its peak in the analysis of Hegarty, where the judge acknowledged that whether a change in kind and degree occurred in Hegarty’s hours bordered on “ambiguous.” (Decision, p. 8, lines 28-29). But prior to the alleged “change,” Hegarty worked as little as 29.25, 8, 22.25, 37.25, 34.25, 29.5, 32, 32, 20, 37, 37.25, 37, 29.75 in certain weeks. (Decision, Appendix B). Then, almost immediately after the alleged “change,” Hegarty again worked 40 hours or more in several weeks. (Id.) It is thus inexplicable that the judge could have found Hegarty’s hours “changed” to less than 40 hours in a week, when Hegarty was working 40 hours per week almost immediately after the alleged “change” and Hegarty worked as little as 8 hours prior to the alleged “change.” Accordingly, in order to find that there was a “change” in Hegarty’s hours worked in kind and degree, the judge was forced to examine several different time periods in order to come up with the one that best supported a “change.”²⁷ But, in actuality, Hegarty’s hours varied greatly before the date of the alleged “change,” just as they did after the alleged “change.”

²⁷ The judge found significant the fact that the employer only chose to put additional payroll records in to evidence for Hegarty. (Decision, p. 4, fn.1, p. 7, lines 7-9). But, the General Counsel bore the burden of proof to demonstrate its case, and, as discussed herein, could not do so. Therefore, once the General Counsel could not meet its burden, there should have been no burden whatsoever for Respondent to produce any additional evidence. Moreover, the judge’s treatment of Hegarty’s additional payroll records demonstrate that, regardless of for whom or for what time period Respondent did or did not submit payroll records into evidence, the judge was going to find a time period to support the theory that the alleged “change” occurred. Normally, when a party only submits partial evidence in its case-in-chief, a decision-maker would take an adverse inference against that party. But in the instant case, the judge punished Respondent for the General Counsel’s failures, which further demonstrates that the judge essentially presumed Respondent violated Section 8(a)(5) and essentially placed the burden on Respondent to prove otherwise. See

The judge also focused on the increments of the “payroll deductions” for vacation and sick time in the paystubs of certain employees as evidence that employees’ hours were reduced from 40 hours in a week. (Decision, p. 5, lines 1-10). The judge reasoned that if an employee received paid time off in 8-hour increments, that represented an 8-hour day and 40-hour week, but if they took them in 7.5 hour increments, that represented a 7.5-hour day and 37.5-hour week. (Id.) But, again, there can be no pattern gleaned from this that demonstrates a “change” in hours worked in kind and degree. For instance, Bustos, Coronado, Hegarty, Murray, Ramkhalawan, Ricarze, Tom, and Varghese all took sick or vacation time in 8-hour increments *after* their hours were allegedly “changed” (Decision, Appendix B), and, per the judge’s reasoning, should have been receiving it in 7.5 hour increments. Similarly, Abouzeid, Benoit, Farr, Fontanez, Irabon, Jiminez, Murray, Ramkhalawan, Ricarze, Timms, and Varghese received holiday pay in 8 hour increments both before and after the alleged “change,” while Abraham, Bobby, and Sormani received holiday pay in 7.5 hour increments both before and after the alleged “change.” (Id.).

Accordingly, the judge’s reasoning was entirely based on impermissible guesswork and assumptions that a “change” occurred, supported only by supposed patterns gleaned from the payroll records, that fell far short of supporting a Section 8(a)(5) violation. The reason that the judge could only rely on guesswork and impermissible assumptions is because the General Counsel provided *absolutely no other evidence* to support its case that the alleged “change” occurred. The General Counsel did not call a single employee to testify that Respondent changed his or her hours or provide any evidence that anything affirmatively occurred on the date on which

Leggett & Platt, Inc., 367 NLRB No. 51, slip op. at 15 (2018) (finding no “change” in job bidding procedure despite the fact that, as “the General Counsel points out, Respondent did not introduce Rogers’ bid or award notification,” because “the initial burden is not for Respondent to prove that it complied with the contractual procedure. It is the General Counsel’s burden to prove Respondent did not.”).

the alleged “change” took place—instead, the dates of the supposed “change” appear to be picked almost at random.²⁸ It is precisely for this reason that the judge’s findings should be met with skepticism.

Without any evidence that employees were guaranteed certain hours that they dipped below in certain weeks or any evidence that Respondent took any affirmative action, there is no evidence that any fluctuation in hours worked (to the extent those fluctuations could even constitute a “change”) can be attributed to *Respondent* changing employees’ hours. In other words, in a week where an employee worked less than 40 hours, without the General Counsel providing any evidence as to what occurred in that week, it is complete conjecture that the employee worked less than 40 hours because of Respondent’s actions, as opposed to the employee choosing to work less hours (or any other reason, such as a suspension or leave of absence). The judge’s finding that such limited payroll evidence can establish a *prima facie* case that Respondent unilaterally changed the 20 employees’ hours worked—without any corroboration that it was *Respondent’s decision*, and not *the employee’s decision*, to work less hours—essentially creates a presumption that Respondent took certain actions, where there is otherwise no evidence that Respondent did so. But it is contrary to Board precedent to create a presumption that Respondent violated the law and absolve the General Counsel from its burden of proving its case. See *St. Bernadette’s Nursing*

²⁸ In fact, the Complaint alleges that “[s]ince about *February of 2013*, Respondent has unilaterally decreased bargaining-unit employees’ hours” without “providing notice to the Union and without affording the Union an opportunity to bargain...” (Compl. ¶¶ 19-20) (emphasis added). The General Counsel, however, never explained what happened in February of 2013 that effectuated this supposed “change,” either through testimony or in its opening statement—which actually only focused on the since abandoned theory that Respondent unlawfully changed its hiring practices. (Tr. 8-9). In fact, the General Counsel’s Chart alleges that each of the 20 employees allegedly had their hours reduced in 2014 and 2015. When combined with the lack of evidence and explanation regarding what that evidence shows, the randomness and inconsistency of the General Counsel’s allegations just furthers the point that the General Counsel’s evidence is too flimsy to support a *prima facie* case.

Home, 234 NLRB 835, 840 (1978) (“[T]he inference of illegality may not be made if conflicting conclusions seem balanced; the General Counsel must prove the affirmative, by a preponderance of the evidence.”).

2. The Judge Incorrectly Found that Respondent Failed to Rebut the General Counsel’s Case that Sormani’s Hours were Unlawfully Reduced (Exceptions 8, 19, 20)

To the extent that the General Counsel proved a *prima facie* case that Respondent unlawfully reduced the 20 bargaining unit employees’ hours (which, as discussed in Section IV.B.1, above, is not the case), Respondent successfully rebutted the General Counsel’s case regarding Sormani. The judge seemed to accept the premise that Respondent would not have violated Section 8(a)(5) by reducing Sormani’s hours in conjunction with a position change to a position that was regularly scheduled at less hours. Instead, the judge found that Respondent did not demonstrate that such a change actually occurred. (Decision, p. 7, lines 25-29). However, the judge’s analysis in this regard is lacking.

Montegari testified that, in her experience, a Receptionist working at the Center was likely to be regularly scheduled for 37.5 hours per week. (Tr. 44-46). Although the judge dismissed Montegari’s testimony as “not helpful” because she did not have “personal knowledge” of the details of Sormani’s transfer and any corresponding hours adjustment (Decision, p. 7, lines 28-29), the fact remains that Montegari testified with personal knowledge of the schedule and regular hours worked of the receptionist position at the Center. In fact, Montegari’s testimony was corroborated by the fact that the only other Receptionist hired by the Center—Iren Helen Dobridge—was hired at a regular schedule of 37.5 hours in January 2010. (R. Exh. 2). On the other hand, there was no testimony that contradicted, or impugned in any way, Montegari’s testimony in this regard (as the General Counsel did not call any witnesses).

More significantly, though, the judge completely ignored the fact that the General Counsel *admitted* in its own demonstrative exhibit that Sormani changed positions to Receptionist in 2015 when the General Counsel alleges her hours were reduced. (See GC Exh. 10(a)). It therefore does not seem that the General Counsel disputes the fact that Sormani's position was changed to Receptionist. Given that the Union does not contest this fact and given Montegari's uncontroverted testimony corroborated by the stipulated hiring data, the judge erroneously rejected Respondent's rebuttal of the General Counsel's prima facie case as to Sormani.

V. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Complaint be dismissed, and the Board grant all other just and proper relief.

Dated: January 17, 2019

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

800 RIVER ROAD OPERATING
COMPANY, LLC d/b/a CARE ONE AT
NEW MILFORD

Case 22-CA-204545

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of January, 2019, Respondent 800 River Road Operating Company, LLC d/b/a Care One at New Milford's Brief in Support of Exceptions to Administrative Law Judge's Decision in the above-captioned case has been e-filed with the NLRB and has been served on the following by electronic mail:

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